

No. 14-182

**In the
Supreme Court of the United States**

DANIEL T. IRISH,

Petitioner,

vs.

BURL CAIN, Warden, Louisiana State Penitentiary,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

**REPLY TO OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI**

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REPLY BRIEF FOR PETITIONER

A prosecutor cannot elicit false or misleading testimony (*Napue v. Illinois*, 360 U.S. 264 (1959); *Giglio v. United States*, 405 U.S. 150 (1972)). Nor can he conceal evidence impeaching the only witness to testify that the accused committed the crime for which he is being tried (*Smith v. Cain*, 132 S.Ct. 627 (2012) citing *United States v. Agurs*, 427 U.S. 97, 113 (1976)). These principles are immutable.

On direct appeal, the Louisiana Supreme Court affirmed the conviction of Petitioner Danny Irish for capital murder because it concluded that the State carried its burden of proving Petitioner's identity as the shooter and the robber with the testimony of his "co-perpetrator turned state's witness" (75a), 17 year-old, "mentally slow" (State Br. at 4) Audy Keith. Keith's testimony was the only identity evidence. Though his version of the crime had changed and thus his credibility was much in doubt, the Louisiana Supreme Court held that the jury was entitled to and did believe Keith. The conviction was affirmed on that basis (76-77a).

The jury believed Keith, but the prosecutor seeking Petitioner's conviction did not, and neither did independent State officials at the Louisiana State Penitentiary at Angola. The jury did not see written evidence that the prosecutor and Angola authorities considered Keith a liar, because the prosecutor determined to conceal that written evidence, even though he had it in hand because it was

correspondence to, and from, him personally.¹ These facts are not in dispute.

The State's main argument in opposition to this Petition is that these undisputed facts make no difference. But this argument ignores the analysis of the Louisiana Supreme Court on direct appeal. That Court knew that it was deciding "whether the evidence was legally sufficient to prove the defendant's identity as the perpetrator" (75a) and that "the only direct evidence of the defendant's guilt is the trial testimony of Audy Keith" (*Id.*). Thus, the State's extensive discussion of other trial testimony (State Br. 11, 19-24) and of how it might have been prepared to try this case without Audy Keith (State Br. at 19) are no more than a distraction.² Petitioner was found guilty of murder in the course of a robbery. Keith's testimony was the only proof that Petitioner had committed either crime.

Here, therefore, just as in *Napue* and *Giglio*, Keith's testimony was "determinative of guilt or innocence" (360 U.S. at 269), because "without it there could have been no indictment and no evidence

¹ Even now, the State acknowledges that Keith "was a liar at least some of the time" (State Br. at 31).

² The State points to its evidence that Petitioner planned to commit some other crime (State Br. at 19-24). Petitioner was not charged with or convicted of some other crime and would not face the death penalty had he been charged with or convicted of some other crime. The State's several citations to the penalty phase testimony of Kristee Kline (State Br. at 24) are particularly overreaching. Obviously, penalty phase testimony was not before the jury as it deliberated on guilt.

to carry the case to the jury” (405 U.S. 153-55).³ The prosecutor’s concealment of his own correspondence with the Angola authorities deprived Petitioner of the ability to impeach Keith on the basis of this correspondence when Keith identified Petitioner as the perpetrator of the murder and the robbery, and also when Keith testified (on questioning by the prosecutor) that he had no incentive to lie for the State.⁴ Concealment of this documentary evidence, on these facts, destroys any confidence in Petitioner’s capital murder conviction, and this Court should so hold.

In doing so, this Court would simply be following its own most recent jurisprudence in *Smith v. Cain*, 132 S. Ct. 627 (2012), as well as *Napue*, *Giglio*, and the settled constitutional principles and authorities on which those decisions are based. In *Smith*, this Court recently reversed another Louisiana capital

³ The State incorrectly asserts that Petitioner failed to cite *Napue* or *Giglio* below (State Br. at 12, n. 1). Petitioner in fact cited both cases to the trial court (136a; 147a) and in writs to the Louisiana Supreme Court. More importantly, there is no question that the facts relating to the State’s unwarranted concealment and the prosecutor’s correspondence were exhaustively presented to the trial court and the Louisiana Supreme Court (135a-149a).

⁴ The precise testimony was:

Q: Do you have any reason to lie today?

A: No.

Trial Tr. 3230. Two prosecution investigators were at the time seated in the front row (Trial Tr. 3223). The prosecution highlighted this testimony for the jury in closing (Trial Tr. 3813, 3842-43). Without the concealed documents, Petitioner’s trial counsel could not rebut this testimony or the impact of its use during the prosecutor’s closing argument.

murder conviction based on the State's failure to disclose contradictory statements of the sole eyewitness to the crime, concluding that the statements were "plainly material" because the State's other evidence was not "strong enough to sustain confidence in the verdict". 132 S. Ct. at 630. In *Smith*, this Court cited to its earlier decision in *Agurs*, and in particular to an illustration of the importance of impeachment evidence when guilt depends on one witness:

If, for example, one of only two eyewitnesses to a crime had told the prosecutor that the defendant was definitely not its perpetrator and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony of the other eyewitness.

Id. at 113, n. 21, citing Comment, *Brady v. Maryland and the Prosecutor's Duty to Disclose*, 40 U. Chi. L. Rev 112, 125 (1972).

This case is far worse than the above example. Here, there was only one eyewitness.

The State argues that it is not guilty of unwarranted concealment because it orally disclosed that Keith had claimed that either the prosecutor or the State investigator hit or threatened to hit him (State Br. at 14-15). The State does not claim that the prosecutor provided trial counsel with the correspondence to and from Angola authorities about Keith's claim or the incident at Angola in which the prosecutor participated. Hence, the State is essentially positing that a partial oral disclosure entitled the prosecutor to conceal his own correspondence and fail "to turn over an easily

turned rock” *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir 1992).

What the prosecutor concealed was remarkably different from what was disclosed. The undisclosed correspondence shows that the prosecutor himself had concluded that Keith’s allegations were a “blatant lie,” that Keith had “a bad attitude” and “has shown no remorse” (109a), and that the Angola authorities found “no truth” in Keith’s allegations that he had been physically abused in front of the prosecutor (112a). This Court should reject any suggestion that a partial oral disclosure entitles the State to conceal such compelling documentary evidence.

The State also asserts that the partial oral disclosure was sufficient because Petitioner’s trial counsel could have cross-examined Keith about the Angola incident, or called Angola authorities or the prosecution investigator to testify (State Br. at 28). There is no case law, and no principle of fundamental fairness, which excuses the State’s concealment of documentary evidence, transforms the State’s burden of disclosure to the accused’s burden of inquiry, or requires defense counsel “to call a witness cold, which would be suicidal.” *United States v. Rodriguez*, 496 F.3d 221, 226 (2d Cir. 2007) citing *Leka v. Portuondo*, 257 F.3d 89, 103 (2d Cir. 2001).

In sum, there was no substitute for a document from the prosecutor’s own hand, corroborated by another document from an Angola penitentiary official, both confirming that Keith, the co-perpetrator turned state’s witness and sole eyewitness to the homicide, was nothing but a

blatant liar (or, if Keith had actually been physically abused to force him to testify, that Keith did have an incentive to lie). The jury which convicted Petitioner did not see this evidence, because the prosecutor concealed it. Failure to turn over these impeachment documents constitutes grounds for a new trial.

CONCLUSION

The Petition for a Writ of Certiorari should be granted and the case set for briefing and oral argument.

Respectfully submitted,

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